Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1218

IN THE

Supreme Court of the United States

No.

ROLAND MARKUM, et al.,

Petitioners,

-against-

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Eastern District

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Dated: Albany, N.Y.
January 18, 1989

43pp

QUESTIONS PRESENTED

1. Is a Defendant in a criminal action deprived of due process of law and of a fair trial when the trial court denies his right to submit evidence to the jury in support of his affirmative defense of justification?

2. Does *Roe v. Wade*, 410 U.S. 113 (1973) continue to command a majority of this Court?

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IN THE

Supreme Court of the United States

October Term, 1988

No.

ROLAND MARKUM, et al.,

Petitioners,

-against-

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners, Roland Markum, John O'Brien, Howard Walton, Susan Silcox, Kathy Long, Ellen Jones, Anne Marie Breen, Henry Tenagolio, Joseph Wall and Walter Gies, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on October 20, 1988.

JURISDICTION

The Order endorsed on the petitioners' Petition for Allowance of Appeal in the Supreme Court of Pennsylvania was entered October 20, 1988 (2a). The jurisdiction of this Court rests on 28 U.S.C. 1257(3). The time in which to file this petition has been extended to and including January 18, 1989. (Application No. A-488)

OPINIONS BELOW

There was no opinion in the Supreme Court of Pennsylvania. The majority and two minority opinions in the Superior Court of Pennsylvania are reproduced in the Appendix and have been published at *541 A2d 347*. The opinion of the Trial Judge in the Court of Common Pleas of Philadelphia has been reproduced in the Appendix.

STATUTE INVOLVED

The Pennsylvania statute governing the criminal defense of justification, 18 Pa.C.S., Sections 501 to 510, reads in pertinent part as follows:

Section 503 * * *

(a) General rule — Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

STATEMENT OF THE CASE

Petitioners are peaceful[1] demonstrators who sought to confront the federal constitutional vacuum in the legal protection of human life. They did so at an abortion clinic, Northeast Women's Center, Philadelphia, PA, the type of facility where most abortions are performed nationally. The demonstration occurred on August 10, 1985.

The demonstrators refused to leave the abortion clinic when ordered to do so and were arrested by the Philadelphia police. Each of the petitioners was charged, *inter alia*, with the crime of Defiant Trespass.

At their trial before a jury, petitioners[2] interposed a common defense of justification. In accordance with Pennsylvania criminal procedure, the testimony in support of the defense was heard in the first instance by the trial court outside the presence of the jury. After hearing testimony on the record (Tr. 9/25/86, pp. 143-178), the trial court excluded petitioners' evidence in support of their defense of justification under the Pennsylvania statute, 18 Pa.C.S., Section 503 (see STATUTE INVOLVED).

The justification testimony sought to be introduced at their jury trial by petitioners consisted of medical expert evidence concerning the advances in medical technology described generally in Justice O'Connor's dissenting opinion in *Akron vs. Akron Center for Reproductive Health*, 462 U.S. 416, 456-458 (1983). Outside the presence of the jury, George Isajiw, M.D., petitioners' medical expert, testified that viability outside the womb has moved backward so that premature children now survive when born in the 19th week after conception. (Tr., 9/25/86, pp. 166-167). Justice O'Connor's dissenting opinion, *supra*, was cited in the dissenting opinion of Judge Tamilia in the Superior Court of Pennsylvania.

Each petitioner was convicted of the crime of Defiant Trespass but was acquitted of all other charges.

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[1] Although petitioners were charged with other crimes, they were convicted by the jury only of the crime of "Defiant Trespass", consisting of a refusal to leave the clinic when ordered to do so.

[2] Petitioners Henry Tenaglio and Joseph Wall were tried at a bench trial before the same Trial Judge in which the jury trial testimony was stipulated into evidence.

REASONS FOR GRANTING THE WRIT

After fifteen years of seeking, by all lawful means, to bring this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) before Congress for a vote, or before this Court for reconsideration, thousands of law abiding citizens are now engaging in heightened demonstrations or "rescues" at abortion clinics throughout the United States. The demonstration conducted by petitioners on August 10, 1985, was typical of the demonstrations now occurring nationwide in that the "rescuers" sought to prevent scheduled abortions from being performed at a single abortion clinic on a single day by engaging in conduct for which they knew they would be arrested. Each demonstrator knew that his or her conduct would otherwise be criminal except for the defense of justification sought to be interposed in this case. By interposing that defense, petitioners hoped to provide a case in which this Court will have an opportunity to reconsider *Roe v. Wade*. (See *Terry v. New York*, Doc. No. 87-110, *cert den.*)

As noted in *Terry v. New York*, it has been publicly known since 1986 that at least four of the Justices of this Court have voted in favor of reconsidering *Roe v. Wade*. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2190-2192 (1986). More recently, *Webster v. Reproductive Health Services*, No. 88-605, this Court granted *cert.* in a case in which the Solicitor General of the United States again suggested such reconsideration. The case at bar also presents an opportunity for this Court to reconsider *Roe v. Wade*, an event which has been anticipated by the American public for some time.

A further reason for granting the writ involves an important question of criminal procedure implicating the right to a fair trial under the Due Process Clause of the Fourteenth Amendment in the context of public interest protest activity.

Evidence negativing criminal intent, when intent is an essential element of the crime charged, is always admissible and therefore available as a defense. See Wharton's Criminal Evidence (13th ed., 1972), Section 168, p. 313, text at note 70.

Criminal due process requires that the trial court instruct the jury that *intent*, when it is an essential element, must be proved

beyond a reasonable doubt *and* to adequately make clear in the charge to the jury that defenses relating to an essential element of intent must be disproved beyond a reasonable doubt by the prosecution. *Sandstrom v. Montana*, 442 U.S. 510 (1979). *A fortiori*, a defense of justification, which negatives the essential element of intent in the crime of trespass, is constitutionally required to be presented to the jury.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Pennsylvania.

Dated: Albany, N.Y.
January 18, 1989

Respectfully submitted,

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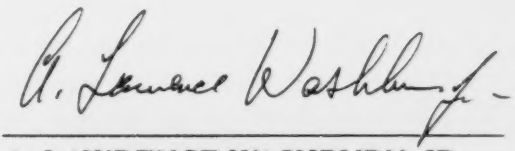
CERTIFICATE OF SERVICE

A. LAWRENCE WASHBURN, JR., a member of the bar of this Court, hereby certifies that three (3) true copies of the within Petition for Certiorari has been served by regular U.S. mail upon opposing counsel:

RONALD EISENBERG, ESQ.
Assistant District Attorney
1421 Arch Street
Philadelphia, PA 19102
(215) MU6-5730

and that all parties required by the Rules of this Court to be served have been served.

Dated: Albany, N.Y.
January 18, 1989



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APPENDIX

Supreme Court of Pennsylvania
Eastern District

October 21, 1988

Samuel C. Stretton, Esquire
301 South High Street
P.O. Box 3231
West Chester, Pennsylvania 19381

RE: Commonwealth of Pennsylvania v. Roland Markum, etal
No. 511 E.D. Allocatur Docket 1988

Dear Mr. Stretton:

This is to advise you that the following order has been endorsed on your Petition for Allowance of Appeal, filed in the above-captioned matter:

"October 20, 1988.

Petition denied.

Per Curiam."

Very truly yours,

/s/_____
PATRICK TASSOS
Deputy Prothonotary

/aw
cc: Ronald Eisenberg, Esquire

Exhibit "B"

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
ROLAND MARKUM, JOHN O'BRIEN, HOWARD WALTON, SUSAN SILCOX, KATHY LONG, ELLEN JONES, AND ANNE MARIE BREEN,	
Appellants	No. 03154 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
HENRY TENAGLIO and JOSEPH WALL	
Appellants	No. 03155 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
WALTER GIES,	
Appellant	No. 03387 Philadelphia 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

PROTHONOTARY

Dated: MAY 2, 1988

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
ROLAND MARKUM, JOHN O'BRIEN, HOWARD WALTON, SUSAN SILCOX, KATHY LONG, ELLEN JONES, AND ANNE MARIE BREEN, Appellants	No. 03154 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
HENRY TENAGLIO and JOSEPH WALL Appellants	No. 03155 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
WALTER GIES, Appellant	No. 03387 Philadelphia 1986

Appeal from the Judgment of Sentence November 6, 1986 in the Court of Common Pleas of Philadelphia County, Criminal No. 477-482 and 645 January Term, 1986, 647 Jan. 86 & 3160 Feb. 86.

Before: CIRILLO, P.J., McEWEN and TAMILIA, JJ.

OPINION BY CIRILLO, P.J.:
Filed May 2, 1988

Appellants take this appeal from a judgment of sentence of one day to three months imprisonment imposed by the Honorable John J. Poserina of the Court of Common Pleas of Philadelphia

County following their conviction for defiant trespass.[1] We affirm.

On August 10, 1985, as part of an anti-abortion demonstration, appellants pushed their way into the Northeast Women's Center on Roosevelt Boulevard in Philadelphia, and occupied several rooms there. Once inside, they damaged two aspirator machines and other medical instruments, threw equipment out of a third floor window, and placed "pro-life" stickers on the doors, walls, and ceilings. Appellants refused to leave, even after several requests by the Center's staff, and were ultimately removed when police arrived and carried them from the scene.

Appellants appeared for trial before the Honorable Mitchell S. Lipschutz of the Philadelphia Municipal Court, and were found guilty. All appellants except Tenaglio and Wall proceeded to a *de novo* trial before Judge Poserina.

During a hearing on a motion in limine, appellants made an offer of proof in support of their claim that they be allowed to present a defense of justification. Following the submission of briefs and argument on March 24, 1986, Judge Poserina ruled that justification did not lie. Judge Poserina certified the question of justification for interlocutory appeal, but this court denied appellants' petition and remanded the case for trial.

On September 30, 1986, the jury returned guilty verdicts as to all appellants. On October 20, 1986, Judge Poserina found the remaining appellants, Tenaglio and Wall, guilty after they stipulated to the testimony presented at the jury trial of their co-defendants.

Following sentencing, the appellants were immediately paroled on the condition that they each perform fifty hours of community service, not to be served in any pro-life agencies, and refrain from trespassing on medical facilities that perform abortions. Post-trial motions were filed and denied and this timely appeal followed.

Appellants raise one issue on appeal: whether the trial judge erred in not allowing appellants to present the defense of justification to the jury.

In Pennsylvania, the defense of justification is grounded in

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[1] These appeals were consolidated by orders dated December 29, 1986, and January 27, 1987.

statute. 18 Pa. C.S. §§501-10. This legislation has several provisions. However, it must be noted that appellants failed to specify which justification provision they deemed applicable to their case. In *Commonwealth v. Capitolo*, 508 Pa. 372, 381-382, 498 A.2d 806, 810-811 (1985), our supreme court held that a litigant must specify which section of the justification statute their claim is based upon. In *Capitolo*, the appellants proceeded under §503; therefore, the court held that any claim under §510 was waived. Here, where appellants only nebulously claimed justification, without specifically invoking either §§503 or 510, their claim may have been waived altogether. However, inasmuch as appellants asserted the defense at trial, in post trial motions, and again on appeal, we will consider the issue to be properly preserved and presented.

Section 503 states:

> (a) General rule. — Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:
>
> (1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
>
> (2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (b) Choice of evils. — When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Section 510 states:

> Conduct involving the appropriation, seizure or destruction of, damage to, intrusion or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(1) this title or the law defining the offense deals with the specific situation involved: or

(2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

The Pennsylvania Supreme Court, in *Commonwealth v. Capitolo*, 508 Pa. 372, 498 A.2d 806 (1985), and *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), addressed the applicability of the justification provisions of §§503 and 510, respectively.

In *Capitolo*, Patricia Capitolo and four others crept under a fence enclosing the Shippingsport Nuclear Power Plant. Once through, they sat down about ten to twelve feet inside of the fence and held hands. They were placed under arrest after refusing requests of plant representatives that they leave the premises. The five sought to present a justification defense under §503, the general justification provision of the statute, but were refused by the trial judge because they would not have been able to prove that their trespass was justified. They were subsequently convicted of trespass in the Court of Common Pleas of Beaver County.

On appeal, a majority of this court reversed the decision of the trial court, concluding that appellants' offer of proof met the requirements of §503 and that they should have been able to present to the jury evidence in support of the defense.

Our supreme court reversed and reinstated the convictions, holding that the defense of justification is available only when the appellee is able to make an offer of proof which establishes:

(1) that the actor was faced with a clear and imminent harm, not one which is debatable or speculative;

(2) that the actor could reasonably expect that the actor's actions would be effective in avoiding this greater harm;

(3) there was no legal alternative which will be effective in abating the harm; *and*

(4) the Legislature had not acted to preclude the defense by a clear and deliberate choice regarding the matter at issue.

Capitolo at 378, 498 A.2d at 809 (emphasis ours). The court went even further in stating that

> it is essential that the offer meet a minimum standard as to each element of the defense so that if a jury finds it to be true, it would support the affirmative defense — here that of necessity . . . Where the proferred evidence supporting one element of the defense is insufficient to sustain the defense, even if believed, the trial court has the right to deny use of the defense and not burden the jury with testimony supporting other elements of the defense.

Id.

After applying these basic principles to the facts of the trespass action, the court concluded that the danger at the nuclear plant was not imminent and that the appellees "could not establish that their criminal conduct was necessary to avoid harm or evil to themselves or others." *Id.*

In *Berrigan*, the Berrigan brothers and six others entered the General Electric in King of Prussia, Pennsylvania, where they damaged hydrogen bomb missile components and poured human blood on the premises. Property damage exceeded $28,000. The eight involved were charged and convicted of burglary, criminal mischief, and criminal conspiracy. An offer of proof was made under §510, (the property crimes provision of the justification statute) to present the defense of justification. The trial judge permitted them to offer their own testimony in support of the defense, but refused to permit them to present expert testimony.

On appeal, this court held that appellants should have been able to present the defense, and present expert testimony in support of the defense.

Once again, our supreme court reversed. By applying §§196 and 262 of the Restatement of Torts Second to 18 Pa. C.S. §510, the court concluded that the Restatement imposes upon §510 the requirements that the actor reasonably believe that the act in question was necessary to avoid an imminent and pubic disaster. *Berrigan* at 123-124, 501 A.2d at 229. The court then reiterated the four-part test used in *Capitolo* and determined that the trial court had properly ruled that the offer of proof was insufficient to establish that the nuclear holocaust that appellees sought to avert was a clear and imminent public disaster.

The court in *Berrigan* went even further, however, and held additionally that the defense of justification was not available "in situations where the conduct some perceive to engender public disaster has been specifically approved of by legislation making it legal conduct . . ." *Id.*

Abortion has been specifically approved by the Pennsylvania Legislature in the Abortion Control Act, which was adopted in January of 1983. 18 Pa. C.S. §§3201-3220. Were it not protected by such legislation, the justification defense would continue to remain unavailable because a woman's right to abortion is protected by the Constitution of the United States. *Roe v. Wade*, 410 U.S. 113 (1973). The *Berrigan* mandate that a justification defense may not be raised if the asserted "harm" is legal is not dependant upon whether such conduct has been made legal through legislative choice or judicial fiat. We live in a society of laws and no individual is entitled to raise himself above the law. We are each bound by the law no matter its source. Were we free to pick and choose which laws we wished to obey, the result would be a society of strife and chaos. Therefore, even if the legislature had not made a clear choice regarding abortion, the justification defense would be unavailable because abortion is lawful by virtue of the United States Constitution. Certainly, justification may not be asserted as a grounds for interference with a person's right to free speech even though that right has not been legislatively approved. Free speech has been constitutionally approved, as has a woman's right to abortion. Democracy allows the citizenry to protest laws of which they disapprove. But they must nonetheless obey such laws or face the legal consequences. To allow the defense of justification to those who willingly and intentionally break the law would encourage criminality cloaked in the guise of consciense.

As the *Capitolo-Berrigan* test makes clear, there must be a threat of an imminent and public disaster. Appellants' offer of proof was insufficient as a matter of law to satisfy this four-part test. The use of justification as a defense could be precluded on this ground alone, regardless of the fact that abortion is legally sanctioned.

Appellants wish to produce testimony to establish that life begins at conception. They wish to show scientifically that a

fetus as young as eight weeks of age as measurable brain-wave activity. Because Pennsylvania's Declaration of Death Act, 35 Pa. C.S. §§10201-10203, provides that death occurs when all brain activity ceases, appellants assert that their evidence would demonstrate that abortion is the taking of a human life, and hence, a "public disaster." They also claim that the disaster was imminent, not speculative, and that their actions were effective in averting the disaster. Finally, they assert that there was no legal alternative for their actions.

Appellants' first argument, that abortion constitutes a public disaster, fails. As we have noted, pre-viability abortion is lawful by virtue of state statute and federal constitutional law. The United States Supreme Court, from *Roe* through its progeny, has consistently held that the state's interest in protecting fetal life does not become compelling, and cannot infringe on a woman's right to choose abortion, until the fetus is viable. *Roe* at 163-164. Appellants do not suggest that viability and conception are simultaneous occurrences. We find that a legally sanctioned activity cannot be termed a public disaster.

Appellants' second argument, that the disaster was imminent and that their actions were effective in averting it, similarly must fail. It is unreasonable for appellants to believe that their brief occupation of one center would effectively put an end to the practice of abortion. Appellants' occupation of the Women's Center did not stop its operation. Legal abortions continued to be performed in the Center and were available in other medical facilities throughout Pennsylvania.

Appellants' third contention, that there was no legal alternative to their actions, is misguided. As Judge Poserina noted, "[t]here are obviously numerous means in a democratic society to express a point of view or to attempt to prevent a perceived harm without resorting to criminal behavior." Appellants were free to peacefully demonstrate outside of the center in an effort to prevent the harm that they perceived from occurring.

Finally, appellants' offer of proof was insufficient to show that no legislative purpose exists to exclude the justification defense, nor could they, because Pennsylvania law is to the contrary. The Abortion Control Act specifically provides that "[i]n every relevant civil and criminal proceeding in which it is possible to do so

without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed to extend to the unborn the equal protection of the laws . . ." 18 Pa. C.S. §3202(c) (emphasis ours). Clearly, to permit private citizens the right to prevent women from exercising their right to abortion would be a violation of both state statute and federal constitutional law.

As in *Berrigan*, appellants in the instant case were trying to halt legal conduct. It has been suggested that the justification defense might lie where appellants can show that the conduct which they attempted to halt was illegal. However, even if illegal conduct could be proven, and appellants' offer of proof contained no allegations that the Northeast Women's Center was engaging in other than legal abortions, the *Capitolo-Berrigan* test would prohibit the use of the defense if there were other legal alternatives for abating the harm. Because the Pennsylvania Abortion Control Act specifically prescribes post-viability abortion (with narrow exceptions), any public disaster that such abortions present can be adequately controlled by law enforcement personnel. *See* 13 Pa. C.S. §3201(a). Therefore, any claim of justification under §510 will fail according to the supreme court mandate in *Berrigan*. Appellants cannot use unlawful means in an effort to stop lawful behavior, no matter how morally reprehensible they feel that behavior to be. "[T]respassing on private property . . . is not legally justified by philosophical disagreement. (The justification defense) does not condone . . . ad hoc self help which forebodes legal chaos." *Capitolo* at 381, 498 A.2d at 810.

The appellants are actually requesting that this court countenance civil disobedience, which is defined as:

> A form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law.

Black's Law Dictionary 223 (1st ed. 1979).

Though, our nation has a long and proud history of civil disobedience, appellants are not in that tradition. From the Boston Tea Party to the abolitionists to conscientious objectors to the sit-ins of Martin Luther King, civil disobedience has often stirred our nation's collective conscience and spurred us to change or repeal unjust laws. Often, juries refused to convict good men of conscience whose love of justice had motivated

them to violate the law. On some occasions, a jury would convict but the judge in recognition of the righteousness of the underlying cause would suspend sentence or issue a nominal find. Abortion demonstrators argue that they are in this tradition and should be treated accordingly. They overlook the key distinction between their actions and the behavior of those cited above.

The true conscientious objector refuses to obey the very law which he claims is unjust. Rosa Parks refused to sit in the back of the bus and "draft dodgers" refused to register for the draft. When prosecuted, they challenged the wisdom, morality and constitutionality of the law in question.[2] They did not employ their objections to that law as an excuse to engage in general or targeted violence. But that is what the demonstrators in this case have done. On this appeal, the demonstrators challenge the applicability of our criminal trespass laws to their activities. But they do not assert that those laws are unconstitutional or unjust. Rather they believe that because they disagree with the practice of abortion they are entitled to deface and occupy property belonging to other persons. How sad that their sense of justice and outrage is so narrowly focused.

Judge Poserina correctly determined that the justification defense would not lie. The action sought to be prevented by appellants was lawful, and as such, could not be prevented by unlawful conduct. Furthermore, appellants' offer of proof was insufficient to satisfy the four-part *Capitolo-Berrigan* test for determining when the defense of justification will lie. For these reasons, we affirm the judgment of sentence.

CONCURRING AND DISSENTING OPINION BY MC EWEN, J.
DISSENTING OPINION BY TAMILIA, J.

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[2] Of course, some civil disobedience such as the Boston Tea Party or the work of the abolitionists calls into question the very moral authority of the government. Obviously, this is not what the appellants intended as on this appeal they seek the protection of a statutory defense promulgated by our government.

COMMONWEALTH OF PENNSYLVAINIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
ROLAND MARKUM, JOHN O'BRIEN, HOWARD WALTON, SUSAN SILCOX, KATHY LONG, ELLEN JONES, AND ANNE MARIE BREEN,	
Appellants	No. 03154 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
HENRY TENAGLIO and JOSEPH WALL	
Appellants	No. 03155 Philadelphia 1986
COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
WALTER GIES,	
Appellant	No. 03387 Philadelphia 1986

Appeal from the Judgment of Sentence of November 6, 1986 in the Court of Common Pleas of Philadelphia County, Criminal No. 477-482 and 645 January Term, 1986, 647 Jan. 86 & 3160 Feb. 86.

BEFORE: CIRILLO, P.J. McEWEN and TAMILIA, JJ.

CONCURRING AND DISSENTING OPINION BY McEWEN, J.: Filed May 2, 1988

Since the rulings of both the United States Supreme Court, in *Roe v. Wade*, 410 U.S. 113 (1973), and the Pennsylvania Supreme Court, in *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), preclude the presentation by appellants of the defense of justification, I am compelled to join in the ruling of my distinguished colleague, President Judge Vincent A. Cirillo, the author of the lead opinion affirming the judgment of sentence. I write, nonetheless, so as to express the view that appellants have surmounted three of the four obstacles to presentation of the defense — a view which is, of course, measurably different from the conclusion of the lead opinion that appellants failed to meet any of the four requirements.

While the defense of justification has a number of synonyms,[1] it is "'often expressed in terms of choice of evils: When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil.'" *State v. Olsen*, 99 Wis.2d 572, _____, 299 N.W.2d 632, 634 (1980) *quoting LaFave & Scott*, Criminal Law §50, at 382 (1972). "Determination of the issues of competing values and, therefore, the availability of the defense of necessity is precluded, however, when there has been a deliberate legislative choice as to the values at issue." *State v. Warshow*, 138 Vt. 22, _____, 410 A.2d 1000, 1003 (1979) (Hill, J. Concurring).

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[1] The general defense of justification is usually thought of as the statutory designation of what had traditionally been termed in the common law as the defense of necessity. It might be said that the term "justification" is somewhat more apt than "necessity": the latter is somewhat misleading since the term "necessity" reflects the notion that the act of the accused was inevitable and unavoidable rather than the voluntary choice of the actor. The defense of justification is also frequently described by the process of its application, such as "choice of evils", "competing harms", "compulsion", "balancing of harms", "balancing of evils", "balancing of competing values", and "confession and avoidance".

The U.S. Supreme Court, in *Roe v. Wade*, 410 U.S. 113 (1973), held that the constitutional right of privacy of a mother is paramount to the right to life of her unborn child during the first trimester of pregnancy. Thus, this nation's highest court balanced the competing interest of the mother in terminating her pregnancy against the right to life of the infant, and held that the right of the mother to terminate her pregnancy during the first trimester is paramount to the right to life of the infant. Our state legislature, in response to *Roe v. Wade, supra*, enacted the Pennsylvania Abortion Control Act, 18 Pa.C.S. §§3201-3220, which authorizes first trimester abortions such as those scheduled for August 10, 1985, at the Northeast Women's Center. The appellants have not asserted that any of the pregnancies scheduled for abortion were beyond the first trimester. *See:* 18 Pa.C.S. §3209.

The Pennsylvania Supreme Court directly addressed the protestors' reliance upon the defense of justification and decreed in *Berrigan* that "the defense of justification will lie only where the actor offers evidence that will demonstrate:

> (1) that the actor was faced with a public disaster that was clear and imminent, not debatable or speculative;
>
> (2) that the actor could reasonably expect that the actions taken would be effective in avoiding the immediate public disaster;
>
> (3) that there is no legal alternative which will be effective in abating the immediate public disaster;
>
> (4) that no legislative purpose exists to exclude the justification from the particular situation faced by the actor."

Id. at _____, 501 A.2d at 229.

Thus, an accused who wishes to present evidence in support of the defense of justification must make an offer of proof as to each one of the four specific elements of the defense, namely, efficacy, imminency, lack of legal alternative, and absence of a legislative purpose to exclude the defense. It follows, of course, that the trial court is obliged to preclude any effort to rely upon the defense even if but one of the four elements cannot be demonstrated.

The disaster which appellants sought to prevent was the abortions that would be completed in a very brief time after the women entered the building. While it is to be conceded that a certain number of the women entering the building sought but information, a significant number of women were entering the clinic to effect an abortion. The danger perceived by appellants was, therefore, clear and imminent. Further, were appellants able to prevent the women from entering into the building, their action would have been quite effective in thwarting the immediate disaster appellants perceived as awaiting the women and their unborn children in the clinic. And, of course, appellants had no legal alternative available. Therefore, I conclude that appellants complied with three of the conditions precedent to presentation of the defense of justification.

It is the fourth and final element that impedes the presentation of the defense of justification by the appellants. The fourth condition prescribed by the Pennsylvania Supreme Court in *Commonwealth v. Berrigan, supra* at ____, 501 A.2d at 229, required appellants to establish that "no legislative purpose exists to exclude the justification from the particular situation faced by the actor." The Pennsylvania Abortion Control Act, 18 Pa.C.S. §§3201 *et sec.*, enacted as a consequence of the *Roe v. Wade* decision of the United States Supreme Court, evinced the intention of the Pennsylvania Legislature to exclude the defense of justification in the situation confronting appellants. Thus, the appellants here did not — in fact, could not — establish the absence of a legislative purpose to exclude the defense of justification.

My eminent colleague, Judge Patrick R. Tamilia, provides an insightful rationale based upon his view that "the Supreme Court, in fixing viability at a point supported by medical knowledge as it existed at *that time* (1973), . . . has left open the question of when the state may intervene, to be dependent upon medical evidence as to viability . . ." I differ with that interpretation and, in support of my view, note that those who abhor the ruling do so because, contrary to the dissent, the United States Supreme Court held in firm and certain fashion that the right of the mother to terminate her pregnancy during the first trimester is paramount to the right to life of that infant. On the other hand, the rationale of Judge

Tamilia is no less a plea and one in which I fervently join, namely, that the United States Supreme Court, in response to accepted medical knowledge, enhanced by the technological improvements occurring during the fifteen years since the evidence was assembled for presentation to the Court in *Roe v. Wade*, proceed in urgent fashion to reject as outmoded the evidence of viability relied upon in *Roe v. Wade*.

Nonetheless, I am constrained to concur in the affirmance of the judgment of sentence.

COMMONWEALTH OF PENNSYLVANIA

v.

ROLAND MARKUM, JOHN O'BRIEN, HOWARD WALTON, SUSAN SILCOX, KATHY LONG, ELLEN JONES, AND ANNE MARIE BREEN,

Appellants

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 03154 Philadelphia 1986

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 477-482 and 645 January Term 1986

COMMONWEALTH OF PENNSYLVANIA

v.

HENRY TENAGLIO and JOSEPH WALL

Appellants

No. 03155 Philadelphia 1986

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 647 January 1986, 3160 February 1986

COMMONWEALTH OF PENNSYLVANIA

v.

WALTER GIES,

Appellant

No. 03387 Philadelphia 1986

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 483 January 1986

BEFORE: CIRILLO, P.J., MC EWEN and TAMILIA, JJ.

DISSENTING OPINION BY TAMILIA, J.:

Filed May 2, 1988

I follow and support the reasoning of the majority in its analysis of the justification defense to the point where it holds that justification defense in abortion is precluded by legislative and constitutional protection. Abortion Control Act, 18 Pa.C.S. §§3201-3220. *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973). Abortion is constitutionally protected but it is a qualified protection. *Roe, supra.* The significant distinction between this case and *Commonwealth v. Capitolo*, 508 Pa. 372, 472 A.2d 806 (1985) and *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985) is that there was no imminent danger in constructing atomic warheads. Abortion stands on an entirely different footing. I believe the defense is available in two respects despite statutory and constitutional limitations. First, if the clinic was processing abortions beyond the time of viability, as established by *Roe*, the right to protect the life of a fetus in those circumstances would exist within the present legislative and constitutional parameters. While the appellants would base their defense on proof that life begins at conception and that there are measurable brain waves in a fetus as young as eight weeks of age, the Supreme Court in *Roe*, having established the right to intervene by the state *only* at the point of viability, their argument as to life beginning as determined by brain wave activity is irrelevant. However, the Supreme Court, in fixing viability at a point supported by medical knowledge as it existed at *that* time, in my opinion has left open the question of when the state may intervene, to be dependent on medical evidence as to viability at the time at issue. *Roe v. Wade* was promulgated in 1973. In the intervening years, enormous strides have been made in sustaining life of fetuses outside the womb, who, at the time of *Roe*, were considered nonviable. In *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 76 L.Ed2d 687, 103 S.Ct. 2481 (1983), the majority summarized the holding in *Roe* and subsequent abortion decisions as follows:

> First, a State has an "important and legitimate interest in protecting the potentiality of human life." [*Roe*] at 162, 35 L ED 2d 147, 93 S Ct 705. Although the interest exists "throughout the course of the woman's pregnancy," Beal v. Doe, 432 US 438, 446, 53 L Ed 2d 464, 97 S Ct 2366 (1977), it becomes compelling only at viability, the point at which the fetus "has the capability of meaningful life outside the

> mother's womb." Roe, supra, at 163, 35 L Ed 2d 147, 93 S Ct 705. See Planned Parenthood of Central Missouri v. Danforth, 428 US 52, 63-65, 49 L Ed 2d 788, 96 S Ct 2831 (1976). At viability this interest in protecting the potential life of the unborn child is so important that the State may proscribe abortions altogether, "except when it is necessary to preserve the life or health of the mother." Roe, 410 US, at 164, 35 L Ed 2d 147, 93 S Ct 705.

Id. at 428, 76 L.Ed. 2d 702, 103 S. Ct. at ____.

The dissent, authored by Justice O'Connor, joined by Justices White and Rehnquist, carried the concept of flexibility as to viability beyond that discussed in the majority. The dissent stated:

> Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.
>
> In 1973, viability before 28 weeks was considered unusual. The 14th edition of L. Hellman & J. Pritchard, Williams Obstetrics (1971), on which the Court relied in Roe for its understanding of viability, stated, at 493, that "[a]ttainment of a [fetal] weight of 1,000g [or a fetal age of approximately 28 weeks gestation] is . . . widely used as the criterion of viability." However, recent studies have demonstrated increasingly earlier fetal viability. It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed, the Court has explicitly acknowledged that Roe left the point of viability "flexible for anticipated advancements in medical skill." Colautti v. Franklin, 439 US 379, 387, 58 L Ed 2d 596, 99 S Ct 675 (1979). "[W]e recognized in Roe that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term." Danforth, supra, at 64, 49 L Ed 2d 788, 96 S Ct 2831.
>
> The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion

> procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decision making [sic] through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . ." A. Cox, The Role of the Supreme Court in American Government 114 (1976). The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

Id. at 456-58, 76 L.Ed.2d at 720-21, 103 S.Ct. at ____

The significance of these holdings is that *Roe* was considered in 1973. *Akron* was argued in 1982, and we now have the case sub judice under consideration in 1988. In the 15 intervening years it is acknowledged that viability has been reduced to below 24 weeks, as opposed to 28 weeks under *Roe*. While there is no break in the underlying position that viability of the fetus determines when the state interest may be invoked on its behalf, as opposed to conception, the standards applied in *Roe* are no longer applicable for that determination.

This is the point at which I depart from the majority. Even assuming that a defense of justification based upon conception as put forth by appellant is fruitless because of holdings of *Roe* and legislative enactments such as the Abortion Control Act, that defense may still be available to late-term abortions as to viability. Since the majority wisely ignored waiver for failure to specify the justification defense under either sections 503 or 510, we may consider that defense as it applies to the entire spectrum

of fetal life where viability is implicated. As Justice O'Connor stated in her *Akron* dissent, "It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed the Court has explicitly acknowledged that *Roe* left the point of viability 'flexible for anticipated advancements in medical skills'." Citations omitted. *Id.* at 457, 76 L.Ed.2d at 720-21, 103 S.Ct. at ____.

If viability has significantly been advanced and abortion services continue to apply the 1973 *Roe* standards, then a state interest in protecting fetal life is likely implicated in some cases. Fetal life is, therefore, protected in those instances and the defense of justification would be available to persons attempting to protect or save a fetus capable of surviving under the advanced medical standards. Unquestionably, clinics and hospitals can and do establish standards and controls to assure that no abortions are performed except in cases in which the fetus could not be viable under advanced medical technology. This may not, however, be presumed in the face of an offer of proof on the defense of justification.

This case, therefore, cannot be decided on the law promulgated under *Capitolo* and *Berrigan, supra.* There, the danger to life was not imminent and there were no specific individuals who could be identified as being in danger nor could the actions of the protesters be effective in avoiding the greater harm.

In this case, the appellants conceivably could have produced evidence that viability had significantly advanced from the 28 weeks' criterion of *Roe,* that a viable fetus, who would survive under the advanced medical technology available, would be terminated and that the actions of the appellants would be effective in avoiding the greater harm as the fetus in that class would have been aborted before legal action would be taken. It is also clear that no legal alternative would have been effective in abating the harm. Thus the denial of the right to pursue the justification defense precluded the appellants from attempting to establish the proof of viability and the inherent right to protect life under the circumstances of this case.

It is acknowledged that this will be a difficult task and the proof may not be forthcoming, despite the offer. However, by rejecting the offer out of hand as to proof of conception, appellants were also precluded from pursuing proof of earlier viability than

recognized by the clinic under *Roe*.

It must be left for another day and to a higher court to pass on the right to intervene under the justification defense as it relates to conception. As of now, this Court, as an intermediate appellate court, is powerless to do so.

I would vacate the judgment of sentence and grant a new trial to permit the appellants the opportunity to invoke the justification defense in respect to the viability standard utilized by the clinic and the likelihood that viable fetuses might be aborted.

Exihibit "C"

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL BRANCH

COMMONWEALTH OF PENNSYLVANIA : JANUARY TERM. 1986

vs.

ROLAND MARKUN	: No. 477
JOHN O'BRIEN	: No. 478
HOWARD WALTON	: No. 479
SUSAN SILCOX	: No. 480
KATHY LONG	: No. 481
ELLEN JONES	: No. 482
WALTER GIES	: No. 483
ANNEMARIE BREEN	: No. 645
HENRY TENAGLIO	: No. 647
	: FEBRUARY TERM. 1986
JOSEPH WALL	: No. 3160
	DEFIANT TRESPASS

TRIAL JUDGE
HON. JOHN J. POSERINA JR.

OPINION

On August 10, 1985 at approximately 8:00 a.m. each of the above named defendants (originally 12 of the defendants, however 2 of them withdrew their appeal from convictions in Municipal Court of Philadelphia), members of a "Pro Life" organization. entered and remained without permission. on the premises occupied by the Northeast Womens' Center on Roosevelt Boulevard in Philadelphia.

Northeast Womens' Center, is a privately owned facility which provides among other things, numerous reproductive health services, such as education, gynecological services, pregnancy testing, and Abortions.

The defendants, are not employees, staff, patients, or invited guests. The admitted purpose of the defendants was for the purpose of interrupting, and/or persuading any patients from undergoing an Abortion.

The Nurse in charge, communicated to each defendant a request for them to leave the premises. The defendants thereupon went into several differenct rooms, including an examination room and/or operating room and refused to leave. The police were called to the scene, and the police also requested each of the defendants to leave peaceably. The response by the defendants, was a uniform refusal to leave. The police arrested each "Pro Life" protestor and caused each defendant to be carried out of the building into a police vehicle.

Each of the defendants were charged with Criminal Trespass Defiant Trespass and Conspiracy. Some had charges of Criminal Mischief placed upon them for allegedly destroying some of the medical equipment during the protest. The Jury Verdict under consideration in this Appeal, however is Guilty of Defiant Trespasser. Each Defendant was sentenced to one day to three months in County Prison, plus 50 hours of community service and $25.00 payable to the Victim/Abuse funds.

At the pre-trial conference in this matter, defense counsel asked the court permission for leave to submit a Motion in Limine. During the pre-trial conference, it was agreed between the Commonwealth and defense that the appropriate motion would be to submit an Offer of Proof together with Points for Charge, which would encompass all of the legal issues raised by the arrest.

At the argument of the motion, defense counsel stated that the clear purpose of the defendants action was "a rescue mission to protect the mother and pre-born child from the act which would destroy the life of the pre-born child".

Defense counsel further asserted that they were aware of the precedence setting cases of *Commonwealth v. Berrigan*, 501 A 2c, 226 (Pa. 1985) and *Commonwealth v. Capitolo* A 2d, (Pa.

1985). In those cases, the Supreme Court of Pennsylvania indicated that the defense of "Justification" can only be used, if the four (4) pronged test has been met:

1. That the actor was faced with a public disaster, which was clear and imminent, not debatable and speculative.
2. That the actor could reasonably expect that the actions taken would be effective in avoiding the immediate public disaster.
3. That there is no legal alternative, which would be effective in abating the imminent public disaster.
4. That no legislative purpose exists to exclude the justification from the particular situation faced by the actor.

Defendants argue that, the Pennsylvania Legislature has adopted a Declaration of Death Act (35 PS 10 201), which indicates that there is life, when there is brain activity. Defendants, offered to demonstrate that medical testimony should be presented to a Jury to allow that Jury to conclude that a pre-born child has brain activity and therefore, by legislation is a human life.

Under defendants theory of the case, a justification defense may be presented, because the death of the child was in fact a public disaster clear and imminent. Further, that the only way to prevent the death of the pre-born child was to take immediate effective action. In addition it is argued: There was no alternative, because even the injunction process would not be available in time to prevent the abortions, which were scheduled for the particular day in question.

Finally, defendants contend that no legislative purpose exists to exclude thie justification defense in this type case.

The Supreme Court of the United States decision in *Roe vs. Wade*, 410 U.S. 113 (1973) was also considered by the Commonwealth and the defense. The exact status of medical knowledge concerning, when a life comes into being was not before the Supreme Court at that time. It was also argued that the state of medical knowledge as of 1975 is substantially different then it is in 1986.

To bolster the argument that Pennsylvania has indeed recognized a pre-born child as a separate person, the case of *Amadio*

vs. Levin. 501 A 2d 1085 (Pa. 1985) was examined by the court and the litigants. In that case, the Supreme Court of Pennsylvania has

[Page 5 of Slip Opinion missing]

The Court asserted that:

> "where the proffered evidence supporting one element of the defense is insufficient to sustain the defense, even if believed, the trial court has the right to deny the use of the defense and not burden the jury with testimony supporting other elements of the defense."

In this case, according to the Commonwealth, the Defendants' Offer the Proof and Memorandum in Support of that offer, fail to establish *any* of the four elements prescribed by *Capitolo.*

The defendants suggest that voluntary termination of a pregnancy by a human life and is the "harm" to be avoided. Without citing authority for the assertion the defendants claim that "for Centuries, American courts and legislatures have almost universally held that abortion is a crime . . ." and that abortion is and always has been condemned by a large segment of Americans." (Defendants Memorandum in Support of Offer of Proof)

The Commonwealth claims that the defense position is not only unsupported but somewhat inaccurate. Lawrence Lader, a leading writer in the area, comments on this narrow view of the subject matter:

> Since abortion laws are often treated as if they were as permanent a part of the social fabric as the Ten Commandments it seems startling to realize that both are civil laws and the common law of the Roman Catholic Church in its present form are a comparatively recent innovation. Abortion was hardly an issue in Britain until 1803 and in most of the United States, not until shortly before the Civil War. In fact, under common law before that time, abortion was not even punishable as a crime when performed in early pregnancy or before 'quickening' as it was called. Since terminations generally occurred before quickening the problem was virtually academic and largely ignored. *L. Lader Abortion (1966)*

James C. Mohn, in his treatise *Abortion in America:* The Origins and Evolution of National Policy (1978) confirms that in

> "absence of any legislation whatsoever on the subject of abortion in the United States in 1800, the legal status of the practice was governed by the traditional British common law as interpreted by the local courts of the new American States."

He notes that the common law did not formally recognize the existence of the fetus until near the midpoint of gestation. Only after this point in gestation was the

> "expulsion and destruction of a fetus without due cause . . . considered a crime . . ."

The first time that an American Legislature addressed the question of abortion in terms of written Legislation was in 1821. In May of that year the General Assembly of Connecticut "passed a revised *'Crimes and Punishment'* law." Section 14 of that law prohibited the administration of any deadly poison for the purpose of causing or procuring "the miscarriage of any woman, *then being quick with child* . . . Commenting upon the fact that Connecticut chose to criminalize only those abortions effected after quickening Mohn notes (i)n this respect the law testified eloquently to how deeply committed Americans of the early nineteenth century were to the quickening doctrine . . ."

The United States as a whole remained "committed to the basic tenets of common law" through 1841. It took sixty years before the United States became a nation where abortion was "legally and officially prescribed."

Today the pendulum has swung back to a position similar to that of early American statutory and common law. Nearly all Americans today believe that the question of abortion should be addressed by the woman who is pregnant. (P. Rothstein & M. Williams *Choice!* Legal Abortions Arguments. Pro & Con. (1983)

The Commonwealth further argued as follows: "polls show overwhelming-and growing-support for legal abortion. Typically, a 1982 Associated Press — NBC poll showed that 77% agreed that abortion should be left to the woman and her doctor', and that support for abortion rights cuts across political, age, religious, income, education, race and sex differences. In other words

most Americans do not feel that legalized abortion is a "harm." Indeed, most Americans feel that abortion is a medical procedure that should be employed if the pregnant woman so wishes.

Most important of all the termination of pregnancy is legal. The Federal Constitution, as construed by *Roe v. Wade* Provides that "[t]he right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." That right is in no way abrogated by Pennsylvania's Abortion Control Act of 1982 which adheres, albeit strictly, to the Constitutional interpretation and permits women to terminate pregnancy. The "harm" the defendants assert is a legally and socially accepted procedure in American life today. Taking the defendants' arguments in their best light one could only conclude that the "harm" espoused, if it is in fact a "harm", is nothing more than a "speculative" or debatable harm: the existence of which fails to satisfy the test set down in *Capitolo*.

Furthermore the defendants' assertion of "justification" under Section 503 must fail because there has been no indication as to how they could reasonably believe that their actions of August 10, 1985 would be effective in avoiding the greater "harm" they claim exists. In *Capitolo*, the Court held that the mass sit-in at the Shippingport nuclear power plant

> "Neither terminated nor reduced the danger which they claimed was posed by the presence of the radio-active fuel in the plant, nor could their conduct have done so . . .
>
> Appellees could reasonably foresee that their trespass would fail to halt the operations of the power plant . . . Since we do not see how any reasonable person could perceive that a shut-down plant posed an immediate evil or harm, or how a sit-in could permanently shut down the plant it was not error to deny Appellee the protection of the defense . . .

Nevertheless, the defendants have petitioned the Court to conclude, that their "intervention" and "rescue mission" on August 10th "prevent(ed) the operation of the abortion clinic" and that "by counseling individuals who were seeking abortions and convincing them not to have abortions human life was saved.

The Commonwealth further asserted that the actions of the defendants neither reduced the danger they claim is posed by

the presence of the Women's center nor could they reasonably foresee that their trespass would succeed in halting operations of the clinic and prevent the "immediate public disaster" which they claim results from such operations.

The defendants cannot establish the crucial nexus between the harm and its prevention: therefore, their reliance upon Section 503 remains unfounded.

Even if the Court were to decide that the Defendants' Offer of Proof adequately satisfied the first two elements of the *Capitolo* test the defendants have, nonetheless, failed to demonstrate "that there is no legal alternative which will be effective in abating the harm."

There are obviously numerous means in a democratic society to express a point of view or to attempt to prevent a preceived harm without resorting to criminal behavior. In *Capitolo* the defendants averred in their offer of proof that "efforts before public boards and agencies are ineffective and have been exhausted with regard to operating nuclear power plants . . . (471 A 2d 462, 466-1984) No such claims have been made by the defendants.

Finally, the defendants have not demonstrated that "the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." As noted above, early termination of pregnancy has been judicially and legislatively found to be legal. In January of 1983 the Pennsylvania Abortion Control Act became effective law. (18 Pa. Const. Stat. Ann & 3201 et seq. Purdon). Although the Act expresses the understandable concern for the protection of human life, it, nevertheless, concedes that women have the right to choose abortion over childbirth.

The defendants argue that no language in the Abortion Control Act or in any other Pennsylvania Act expressly precludes the justification defense. The commonwealth agrees that nowhere in the Abortion Control Act does the Legislature directly address the term "justification." That fact, however, does not absolve the defendants from demonstrating "that the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issues." Indeed the Act has addressed the applicability of the justification defense in factual contexts similar to the one before the Court in this case. Section 3202 (c) the

"Constitution" section of the Act provides:

> In every relevant civil and criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed to extend to the unborn the equal protection of the laws . . .

The language of the Section obviously favors childbirth over abortion as a matter of public policy; nevertheless it reminds the courts that despite this policy, the Constitutional right to terminate pregnancy must be upheld. Were the court to find the defendants' justification defense argument valid under this factual context, the Federal Constitution, as it related to a woman's right to terminate a pregnancy, as construed by *Roe v. Wade*, would be violated. Such an application of the justification defense would trigger a violation of the "Construction" section of the Abortion Control Act. There can be no disagreement that application of the justification defense to the facts of this case would sanction behavior aimed at preventing women from exercising their Constitutionally granted right to pregnancy termination. Allowing individuals to blockade medical operating rooms or to dismantle or destroy medical equipment under the protection of justification would constitute a direct violation of the Federal Constitution and the Abortion Control Act. The Pennsylvania Legislature, therefore, has precluded the application of the justification defense in the factual context presently before the court. *"Section 503 does not condone this type of ad hoc self-help which forbodes legal chaos."*

In its most recent discussion of the "Justification" defense the Supreme Court of Pennsylvania was presented with a set of facts similar to those of *Capitolo* in the case of *Commonwealth v. Berrigan*. (501 A 2d 226-1985) In reaffirming that the "Justification" defense is indeed unavailable to anti-nuclear trespassers the Court went even further than it had previously in *Capitolo*. First, the Court concluded that the defendants' acts of destroying nuclear bomb shell casings and the pouring of human blood inside a nuclear facility could not, "under any hypothesis reasonably be expected to be effective in avoiding the preceived public disaster of a nuclear holocaust" (p.230) Moreover, the Court noted, the actions of the defendants failed to satisfy the

requirements of the Justification defense because they were "deliberate and calculated choices." (p.229) The Court held that in order for the Justification defense to be available, proponents must demonstrate that their actions were spontaneous reactions to an immediate harm.

> This defense is based on emergency and can be asserted only by one who is confronted with a widespread public crisis which does not allow the actor to select from among several solutions, some of which do not involve criminal acts.

In this case, as in *Berrigan*, the acts of the defendants represent the end product of a deliberate and calculated plan developed by an organized group pursuant to well-established religious and political point of view. There was nothing spontaneous about the defendants' actions on August 10, 1985.

The overriding significance of the Court's decision in *Berrigan*, however, is manifested in the Court's holding that a "Justification" defense cannot be asserted where the alleged "danger" constitutes legal conduct.

Furthermore, the defense attempted to persuade the Trial Court to permit "Justification Defense under Section 510 of the Pennsylvania Crimes Code which provides that: (18 Pa. Const. Stat. 510-Purdon)

> Conduct involving the appropriation, seizure or destruction of damage to, intrusion or interference with property is justifiable under circumstances which would establish a defense or privilege in a civil action thereon unless:
>
> (1) this title or law defining the offense deals with the specific situation involved; or
>
> (2) a legislative purpose to exclude the justification claimed otherwise appears.

The Superior Court in *Capitolo* suggested that where conduct involves intrusion on property and where justification is offered as an affirmative defense, Section 510 is necessarily implicated.

The defendants in the case at bar are, therefore, required under *Capitolo* to meet the requirements of Section 510 as well as those of Section 503 in order to successfully argue justification.

The Superior Court indicates that the "standard of justification" under Section 510 is stated somewhat differently from the standard stated in Section 503. The Court apparently arrived at that conclusion by incorporating *Section 196* of the *Restatement (Second) of Torts* into Section 510. Section 196 states:

> One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.

Comment (a) to section 196 explains that for the privilege to attach the trespass must be committed "to protect against or repel a public enemy, or to prevent or mitigate the effects of an impending public disaster such as a conflagration, flood, earthquake, or pestilence." As noted above the "harm" sought to be prevented by the defendants is in actuality a socially, legislatively and judicially accepted medical procedure. Most Americans favor the right of a woman to obtain a safe abortion. The defendants have attempted to transform a value judgment into an objective "public disaster." The Restatement speaks of objective disasters in terms of earthquakes and floods not in terms of disasters that may exist for those holding certain philosophical, religious or moral beliefs.

The remaining requirement under Section 510 that the actor "reasonably believes" in the necessity of this conduct does not differ in substance from the standard stated in 503.

CONCLUSION

The Supreme Court has refused to condone the invasion of private property where the basis for such is, in reality, philosophical disagreement. The Court has likewise rejected the defendants' attempts to justify their "ad hoc self-help" actions of August 10, 1985 for such activity, whether asserted under Section 503 or Section 510, because of the Courts belief that to do otherwise would result in Chaos and civil anarchy which must not be judicially permitted or encouraged.

For the foregoing reasons, the Court has ruled to prohibit the defendants from eliciting or presenting any evidence or testimony directed toward the affirmative justification defense.

BY THE COURT:

/s/ _____

J.